



September 8, 2000

Mr. John S. Teer
General Counsel
Texas State Board of Medical Examiners
P.O. Box 2018
Austin, Texas 78768-2018

OR2000-3463

Dear Mr. Teer:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 138719.

The Texas State Board of Medical Examiners (the "board") received a request for a copy of the deposition of a physician that was taken by a staff attorney for the board. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

Initially, we must address the consequences of your concession that the board did not comply fully with section 552.301 of the Government Code in requesting this ruling. Section 552.301 prescribes the procedures that a governmental body must follow in seeking a ruling as to whether requested information is excepted from disclosure. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request." Gov't Code § 552.301(b). Section 552.302 provides as follows:

If a governmental body does not request an attorney general decision as provided by Section 552.301 and provide the requestor with the information required by Section 552.301(d), the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.

Gov't Code § 552.302. You acknowledge that the board failed to request this letter ruling in timely compliance with section 552.301(b).¹ Accordingly, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of that information from the public. Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380-81 (Tex. App.--Austin 1990, no writ). A claim that the requested information is confidential under section 552.101 of the Government Code in conjunction with some other source of law can furnish a compelling reason sufficient to overcome the operation of section 552.302. *See* Gov't Code § 552.101; Open Records Decision Nos. 630 at 3 (1994) (addressing compelling reasons sufficient to overcome non-compliance with section 552.301), 325 (1982) (citing statutory predecessor to section 552.101).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Statutory confidentiality under section 552.101 requires express language providing that certain information is confidential or that it shall not be disclosed to the public. *See* Open Records Decision No. 478 at 2 (1987). You claim that the requested information is confidential under provisions of the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. The MPA encompasses chapter 164 of the Occupations Code, which governs disciplinary actions and procedures. Section 164.007 of the Occupations Code provides in relevant part:

(c) Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder.

Occ. Code § 164.007(c). Section 164.007(d) requires the board to provide, at the request of the affected license holder or that individual's counsel, access to information in the board's possession that it intends to offer into evidence in presenting its case in chief at the contested hearing of a complaint. Section 164.007(d) also specifies certain information that the board is not required to disclose. Section 164.007(e) provides that furnishing information under section 164.007(d) does not constitute a waiver of privilege or confidentiality under the MPA or other law.

¹You explain that although the board received the request for information approximately March 10, 2000, due to a clerical error you did not request this ruling until July 3, 2000. We note that in requesting this ruling, the board also failed to comply timely with subsections (d) and (e) of section 552.301. *See* Gov't Code § 552.301(d), (e).

In this instance, you inform us that the requested deposition pertains to a formal complaint that the board filed with the State Office of Administrative Hearings ("SOAH") against a physician whose medical license already was subject to a temporary suspension order. You state that SOAH heard the complaint on February 24-25, 2000, and that the disposition of the complaint remained pending on the date of your request for this ruling. You further inform us that the requested deposition is part of the information that the board developed in connection with its investigation and the hearing. You acknowledge that section 164.007(c) requires the board to provide to the affected physician information that the board intends to offer into evidence at the hearing of a complaint. You advise us, however, that the requested deposition was not offered in evidence at the hearing. Based on your representations and our review of the information in question, we conclude that the requested deposition is confidential under section 552.101 in conjunction with section 164.007(c) of the Occupations Code. Accordingly, the board must withhold the deposition from the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

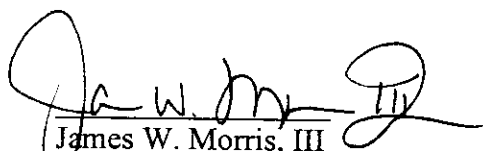
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', is written over a horizontal line.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 138719

Encl. Submitted documents

cc: Mr. Greg Gray
Ted B. Lyon & Associates, P.C.
18601 LBJ Freeway, Suite 525
Mesquite, Texas 75150-5632
(w/o enclosures)